

Memorandum

To: Chairman MacLeod and Members of the Standards Board

Date: June 29, 2010

From: Occupational Safety and Health Standards Board
Marley Hart, Executive Officer

Subject: **Incorporation of National Consensus Standards by Reference into Title 8**

The Board requested to be briefed on this practice. Incorporation by reference has a lot of history and various pluses and minuses. There are copyright concerns and other considerations, and Board staff proposes steps to limit the practice and help employers locate incorporated-by-reference materials, thereby cutting down on the minuses of incorporation by reference.

1. History

For many years, numerous national consensus standards have been incorporated by reference into Title 8 safety orders. Random review of the Standards Board's rulemaking files discloses, for instance, a revision of Section 3282(d) that was undertaken in 1994 to update an ANSI reference and add the words "which is hereby incorporated by reference." The then-existing version of the safety order (a version that appears to have been in place since 1977) referenced a 1968 version of the ANSI standard, and even though the words "incorporated by reference" were lacking, the safety order had the same practical affect with respect to what was required of employers—their eye and face protection equipment had to comply with the ANSI standards in terms of design, construction and testing. Thus, since 1977, the ANSI standard was in effect incorporated by reference, even though the magic words were missing.

The lack of the magic words in early Standards Board regulations may well be attributable to the lack of an Office of Administrative Law (OAL) requirement in this regard. In 1986, however, OAL appears to have promulgated a regulation saying that, if a regulation incorporates a document by reference, the regulatory text is to state that the document is incorporated by reference.

That OAL regulation, California Code of Regulations, Title 1, Section 20, is part of a body of California law that establishes the propriety of incorporation by reference. Another such provision is Government Code Section 11344.6, which is worded in such a way as to acknowledge that matters may be incorporated by reference into the California Code of Regulations. The courts also have recognized the propriety of incorporation by reference. For instance, in Kings Rehabilitation Center, Inc. v. Premo (1999), 69 Cal. App. 4th 215, the Court of Appeal held that the practice of incorporation by reference into the California Code of Regulations is lawful.

2. Pluses and Minuses

Incorporation by reference is beneficial in at least the following respects:

- a. By incorporating lengthy provisions by reference, the size of Title 8 is kept manageable. If all the incorporated-by-reference provisions (or equivalent specially-drafted provisions) were written out in Title 8, Title 8 would encompass hundreds, if not thousands, of additional pages.

- b. National consensus standards often constitute well-considered approaches to dealing with work-place hazards. The national consensus standards generally have evolved over many years and are the work of subject matter experts and stakeholders. The Standards Board does not have the resources to duplicate the work of the national-consensus-standard-setting bodies. And even if the Standards Board had such resources, the resources would not be well spent in efforts to recreate or reshuffle national consensus standards already in existence.
- c. To the extent that national consensus standards are found appropriate for California and are incorporated into Title 8, California is in line with national norms, which, to at least some extent, is likely to make it easier for businesses from other states to invest in California and do business here and for California businesses expand into other states.

As to minuses, critics of incorporation by reference state that documents incorporated by reference into Title 8 can be hard to find and expensive to purchase.

3. Copyright Concerns

National consensus standards are usually, if not always, copyrighted. Therefore, incorporation by reference is required if national consensus standards are to be included in Title 8, unless the copyright holder (usually an industry or stakeholder committee) gives permission to print the standard, or parts of the standard, in Title 8.

Obtaining and working with such permission presents serious problems for the Standards Board. Board staff has explored the possibility of obtaining such permission and has found that it can be difficult to identify and communicate with the copyright-holding entity and that once contacted, the copyright holding entity likely will attach strings to whatever permission is granted.

The zealous manner in which copyrights are protected was shown recently when, in response to a public records request, Board staff asked permission to make two copies of a copyrighted article to be sent to a recipient in Oregon. The copyright holder (a national professional society) granted permission, but limited the number of copies that could be made and required that the Standards Board add to the copies wording intended to limit use of the documents and protect the copyright.

One significant string that may be attached to copyright permission is a limitation of the time period for which the permission is granted. One copyright-holding entity with which Board staff communicated had a form indicating that it normally limited such permission to one year. Such a limitation does not work for the Standards Board. If for any reason, the permission were withdrawn after that year, the Standards Board would have to remove the national consensus standard provisions from Title 8. Per the Administrative Procedure Act, however, such removal would have to be done by rulemaking. Even the most expeditious rulemaking takes months, and during those months, the permission might lapse, and the copyright might be violated.

The Standards Board conceivably could have staff dedicated to obtaining permissions from copyright holders, keeping track of the status of those permissions and taking action before the “permission period” elapses. However, such virtually constant copyright bird-dogging would not be an efficient use of the Standards Board’s limited resources. In addition, there is no guarantee

that even the most efficient bird-dogging would ensure that repeals would take effect on time in instances where the permission to publish copyrighted material has not been extended.

4. Other Considerations

- a. Board staff does not agree that incorporated-by-reference national consensus standards—even really old ones—are as difficult to obtain as some have asserted. As part of a 2008/2009 rulemaking that involved a 1982 version of the Uniform Mechanical Code, it was noted that the code was available for inspection at the Standards Board office, the California State Library and various other libraries in different parts of California. It also was noted that someone interested in possessing a particular portion of that 1982 code could obtain it at a per-page price (believed to be \$2) from the copyright holder.

In addition, Board technical staff states that the IHS Standards Store (www.global.ihs.com) archives many past editions of national consensus standards which are available to the public at reasonable rates. As a test, a reference to ANSI Z87.1 (1979) found in Title 8, Section 3404 was selected randomly, and a search was made at www.global.ihs.com for that ANSI document. The website stated that ANSI Z87.1 (1979) was available either in hard copy or as a download for \$20.

- b. It has been stated that various National Fire Protection Association (NFPA) codes are available for free on line, and for that reason, there might not a problem with reprinting those codes in Title 8. In fact, the problem of ballooning the size of Title 8 augers against inclusion of these NFPA codes, and to the extent the NFPA codes are available for free online, that circumstance means that persons interested in obtaining them should be able to do so with little trouble or expense.
- c. One correspondent was concerned that the Standards Board incorporates updates of national consensus standards into Title 8 on a knee-jerk basis. The correspondent was concerned that the very fact that a national consensus standard is updated creates the perceived necessity to revise California standards. The correspondent was concerned that updated national consensus standards are made part of Title 8 without considering whether the updates are really suitable for California and without giving California stakeholders an opportunity to be heard.

This comment misconstrues the Standards Board’s rulemaking process. Necessity is established as part of that rulemaking process, not by the action of a national consensus standard setting agency. Often, national consensus standard updates are the subject of advisory committees, and even if there is no advisory committee, the opportunity to address national consensus standard updates proposed for Title 8 is provided by the public comment/public hearing process that is always part of the Standards Board’s non-emergency rulemaking.

Board technical staff has noted a number of instances where national consensus standards have been tailored to meet California’s unique needs. One example is the most recent update of the elevator safety orders: the updated national consensus standards were not inserted wholesale into Title 8; instead, those national consensus provisions were winnowed by means of staff

work, an advisory committee and public comment, and only those provisions deemed appropriate for California were incorporated by reference into Title 8.

- d. California occupational safety and health standards must be at least as effective as their federal counterparts. Some federal regulations have national consensus standard references, and those references sometimes are updated, in which case the California standards must be updated accordingly.
- e. Board staff reviews administrative law judge decisions, decisions after reconsideration and rulings on petitions for reconsideration forwarded by the Occupational Safety and Health Appeals Board. Although this review, for background information purposes, is not wholly systematic, it has been pretty comprehensive for several years, and that review has not disclosed that incorporation by reference of national consensus standards has presented any notable citation-related problems for California employers. The one administrative law judge opinion that Board Staff recalls that dealt with incorporation by reference had to do with the fact that a national consensus standard was incorrectly identified in Title 8, Section 3385(c)(2). That error was corrected by a Standards Board rulemaking.

5. Steps Taken by the Board Staff

The Board staff wants to make incorporation by reference as minimal and as user-friendly as possible. Here are some strategies that have been tried in rulemakings during the last couple of years:

- a. As part of the 2008/2009 mechanical refrigeration rulemaking, an informative note was added to Title 8, Section 3248(a) providing readers with information about the whereabouts and availability of the 1982 Uniform Mechanical Code.
- b. As part of a presently-ongoing rulemaking regarding Title 8, Section 4848, the original proposal called for the incorporation by reference of an entire NFPA standard. It was pointed out in a public comment that incorporating the NFPA standard in that fashion might collaterally incorporate by reference a number of other publications mentioned in the NFPA standard. As a result, Board staff examined the NFPA standard and narrowed the incorporation by reference so that only the important parts of the NFPA standard would be incorporated by reference into Title 8 and the NFPA standard's references to the other publications were excluded.
- c. The idea was presented in connection with the amendment of Title 8, Sections 1598 and 1599 that, rather than incorporating various national consensus standard provisions by reference, Sections 1598 and 1599 would merely require that protective garments be labeled as meeting national consensus standard requirements, thereby relieving employers of responsibility for knowing the substance of the national consensus standards. However, that approach was abandoned in the face of stakeholder comments to the effect that the label could come off or become illegible over time, in which case, the concern was voiced that employers might be cited for having garments with inadequate labels.

Board staff will continue to strive to limit the incorporation by reference of national consensus standards. Nonetheless, the Board staff believes strongly that incorporation by reference remains an important rulemaking tool for the Standards Board.